MOHAMED TAIYOB v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Bostock-Hill, J.) May 17, 1947]

Trade and Customs Enactment, Johore, Section 39 (1) (h)—Fraudulent evasion of customs duty—Fraudulent intent.

The appellant was convicted in this case under Section 39 (1) (h) of the Johore Trade and Customs Enactment for being knowingly concerned in a fraudulent attempt at evasion of customs duty. It appeared that on the 7th of December 1946 the appellant was bringing into Johore 25 cases of textiles. On being stopped at the Customs Barrier and asked to fill in a Declaration Form, accused No. 2 acting under the appellant's authority filled in the prescribed form in which the value of the goods was so expressed as to represent an overall price of $1.10 per yard. The prosecution alleged that this figure was too low and amounted to an attempt at fraudulent evasion of customs duty. In his statement the appellant said that he hoped the figure he put would be accepted, and that if not, he would accept the Customs valuation and pay duty on that. The cloths had been bought by the appellant from various traders at different prices and it was agreed that the market was and had been a falling one and that the goods had been bought several weeks previously.

Held, that on the evidence there was not sufficient evidence of fraudulent intent on the part of the appellant to convict him of the offence of attempting the fraudulent evasion of custom duties.

Case referred to: —

(1) *Derry v. Peek* (1889) 14 A.C. 337.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

D. K. Walters (*M. Ismail* and *Wee Chong Jin* with him) for the Appellant.

W. M. McCall for the respondent.

Bostock Hill, J.:—This appeal is an appeal against the conviction of the Appellant (who was No. 1 accused) for an offence under sec. 39 (i) (h) of the Johore Trade and Customs Enactment (No. 80). That section reads: "Whoever is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any customs duty shall be liable on conviction to a fine etc. etc."

The facts are fairly simple: On December 7th 1946, the Appellant was bringing into Johore 25 cases of textiles. On being stopped at the Customs barrier and asked to fill in a Declaration Form, accused No. 2, acting under Appellant's authority, filled in a Form "E" which was produced as Ext. P. 3 in the case.

This Form "E" is the form prescribed under Sect. 13 of the Enactment. (See Gaz. Not. No. 156 of 21st March, 1928, in Johore Govt. Gazette, as modified by Gaz. Not. No. 5 of 4th Jan. 1930).

Accordingly this form was filled up and the Appellant took responsibility for it. It stated that the goods being imported were 25 cases of "Printed Chit" and that the quantity was 45,811 yards to the value of $50,392.10. That value represents an over all price of $1.10 per yard. Whatever the words "Printed Chit" mean, it was agreed throughout the case that the goods were the textiles some of which were exhibited in Court.

In Johore Government Gazette, Gazette Notification No. 1233, dated November 10th 1936, it was laid down that "the value of any imported goods for the purpose of ad valorem duty should be taken to be the price, as ascertained by the Commissioner, that they would fetch on a sale in the open market at the time of importation". Although all customs duties fixed under the provisions of the Johore Trade and Customs Enactment were cancelled by B.M.A. Proclamation No. 30 of 31st December, 1945, I am of opinion that the method of ascertainment of value of goods for the purpose of ad valorem duty referred to above holds good, but, whether it does or not, it is difficult to see what other "value" could be used. In fact, Mr. McCall for the Prosecution agreed that the value to be given was the value on the day of importation.

It was common ground that in this case the duty payable was 20% ad valorem. This was brought into force by G.N. 100 of 31st December, 1945 (B.M.A. Gazette, Part II—Rules) which made the old F.M.S. 1936 customs duties applicable throughout the Peninsula.

The issue in this case then was whether the accused was guilty of attempting a fraudulent evasion of customs duties by putting the figures he did in the Form "E" Declaration, Ext. P. 3.

Two points arise out of this: (1) measure or quantity and (2) value. It was found in the Court below that there had been some confusion between metres and yards, but the learned District Judge specifically found that that was nothing more than a mistake which, in the circumstances, might have been made by any one. I agree with that finding. There remains then the point regarding the value of the goods.

Dividing the total value $50,392.10 by the length 45,811 yards, the value per yard becomes $1.10. It is

on that figure that the accused is charged, it being alleged that it was too low and amounted to an attempt at fraudulent evasion of customs duty. It becomes therefore necessary carefully to consider all the evidence on this point.

When questioned by Mr. Montgomery (Sr. Customs Officer, Johore Bahru) the accused said that he had paid 2 prices for this material, $1.80 per yard for some of it and $1.35 per yard for some. The Appellant then marked the cases for which he said he had paid at the rate of $1.80 per yard and those for which he said he had paid at the rate of $1.35 per yard. He had not the invoices with him.

It appeared subsequently from the evidence of the traders who had sold the goods to him that accused was wrong in marking (as he did, according to Mr. Montgomery) 15 cases as $1.80 cases and 10 as $1.35 cases. The real figures, according to the sellers who were called for the Prosecution, were 5 cases as $1.80 cases (sold by P.W. 3), 10 cases as $1.45 cases (sold by P.W. 1) and 10 as $1.50 cases (sold by P.W. 2).

In his marking of the cases, according to which Mr. Montgomery actually assessed the duty, he thus by implication gave figures that in the total amounted to more than the total price for which he had bought the goods some time previously. It can only be assumed that, as he had not the invoices, he was confused in his mind, especially as the market was a falling one. As to the value of the goods the Prosecution called the 3 traders who had sold them to accused, and 2 Customs Officers. All agreed that the market in such goods was and had been for some time a falling one. Mr. Montgomery himself stated that the market in textiles had definitely declined and (at the time of hearing) had gone down since December 7th 1946.

Examining the evidence of the 3 traders who sold the goods to the Appellant, the following appear to be the salient points:

P.W. 1 (Mohamed Sherrif) sold 20,016 yards of cloth (10 cases) to accused at $1.45 per yard some time in November, 1946. He said he had bought it in October at the same price and was lucky to get that price on selling to accused. He made no profit but the market was dropping. The price had again fallen by December 7th 1946. He gave it as his opinion that it had fallen 10 or 20 cents lower (than $1.45) and said: "I would not be surprised if the price had fallen to $1.10 per yard". He was only asked specifically about the cloth he himself had sold, but he stated that the cloths in Court were not all of a uniform quality and that some were worth more than others.

P.W 2 (V. K. Mohamed Hussein) sold 15,700 (over) yards (10 cases) to accused on 22nd November, 1946, at $1.50 per yard, that being the price at which he had bought it about 10 days earlier. He did this (i.e. sold without profit) because the market was going down daily. He stated that the market price of this cloth on December 7th 1946, would have been about $1.00, or less than $1.10 per yard. The price had fallen about 40 cents. He added that he saw no cloth in Court which wholesale he would have valued at more than $1.10 per yard on December 7th 1946.

At the date he was giving evidence (February 4th 1947) the price of the material he sold to accused was down to 80 or 85 cents per yard.

P.W. 3 (Abdul Kadir) sold 9,950 yards (5 cases) to accused at $1.80 per yard. (Actually he sold 9,950 metres and there was confusion between yards and metres).

He stated that on December 7th 1946, that cloth was, in his opinion, worth $1.40 or $1.50 per yard. He also stated that he knew P.W. 2 and would respect his opinion on textiles, and added "it is difficult to arrive at a value on a falling market".

Finally he said that, though the cloth he sold to Appellant was worth between $1.40 and $1.50 per yard on that day (December 7th), he would agree that cloth of the same quality (as the other cloth in Court) was worth $1.10 per yard on December 7th.

P.W. 5 (Mr. Montgomery) stated that he had been a Customs Officer in Malaya for 16 years, of which at least 10 had been spent in the Preventive Branch. Also that he had considerable experience in the assessment of duty on textiles.

He thought $1.50 a yard a reasonable price for the 3 cases that had been opened.

Appellant then, as described above, marked the cases $1.80 and $1.35, and when asked why he had declared the goods at $1.10 (when he said that he had paid $1.80 and $1.35) replied that he had hoped the Customs would accept this price, and if not that they would raise the price and he would accept the Customs valuation and pay duty on that.

Mr. Montgomery stated that he did not know if similar cloth had passed through the Customs on that date.

Appellant gave correct information as to where he had bought the cloth and admitted the responsibility was his.

P.W. 6 (Mr. Hannigan) stated that he had a lot of experience in assessing the value of textiles and suggested $1.50 was the proper value. He added that he did not know when he last had dealt with similar goods and that he did not make an appraisement of the goods. He further stated that he could assess fairly accurately the value of such goods.

From the evidence of these 5 witnesses it appears that the proper value to be put on the cloths in this case was not easy to ascertain. The 2 Customs officers put it at $1.50 per yard on a somewhat cursory appraisement and the 3 Singapore traders at a much lower price.

The Declaration Form, Ext. P. 3, was filled in as for an overall price of $1.10 per yard and Mr. Walters (for Appellant) stressed the fact that it was an overall price.

Next it is to be noted that by common consent the market was and had been a falling one and that the goods had been bought several weeks previously.

From the details set out above as to how much the values of the cloths sold by them had fallen, the general conclusion of the 3 dealers as to an overall price per yard on December 7th can be summarised as follows :—

P.W. 1 put the price on that day of the cloth sold by him at about $1.30 per yard, but said "I would not be surprised if it had fallen to $1.10". He was not asked about the other cloths.

P.W. 2 put the price of the cloth sold by him at about $1.00 per yard, or less than $1.10. He said "I see no cloth in Court which wholesale I would have valued at more than $1.10 per yard on December 7th".

P.W. 3 put the price of the cloth sold by him at $1.40 or $1.50 per yard on December 7th, but said that he would agree if someone said cloth of the same quality (as the other cloth in Court) was worth $1.10 per yard on December 7th. (The cloth sold by this witness to Appellant was between one-fourth and one-fifth of the total amount of cloth in the case).

These 3 witnesses were all called by the Prosecution and must be taken as speaking the truth to the best of their ability. The net result of this evidence is that the overall figure of $1.10 given by Appellant was not very much below the true value. The 2 Customs Officers both suggested $1.50 as the correct value, but their evidence was not based on the same detailed or expert knowledge of the day to day trade in textiles as was that of P.W. 1, P.W. 2 and P.W. 3. In fact Mr. Hannigan (P.W. 6) said "I did not attempt to make an appraisement of these goods".

This is a criminal case and P.W. 1, P.W. 2 and P.W. 3 were called by the Prosecution as experts and I think that the Appellant is entitled to whatever advantage their evidence gives him.

Two other points need emphasising. The first is that the Appellant was confused when confronted and questioned by the Customs Officer. This is shown by his marking far more cases as $1.80 per yard cases than were sold to him at that high price. Not only did that make his case prima facie a worse one but it also entailed the payment of more duty. The second point is that when he was asked by Mr. Montgomery why he had declared the goods at $1.10 per yard he said he had hoped that the Customs would accept this price and if not that they would raise the price and he would accept the Customs valuation and pay duty on that.

Are these to be taken as indications of fraudulent intent on the part of the Appellant?

As to fraudulent statements in general, the case *of Derry v. Peek*[1] was cited. This was a civil action for deceit, but in Lord Herschell's judgment there are several passages of interest to this case. He lays down the principle that fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Further he says "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds". Later in his judgment he stated that though the conduct of several of the defendants in that action, who were directors of a company and had improperly received sums of money from the promoters, laid them open to suspicion of being ready to put before the public whatever was desired by the promoters, yet that must not be unduly pressed. He added "When I find that the statement

impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion".

In the present case, the overall value given by the Appellant was actually concurred in by P.W. 2 and to a large extent by P.W. 1 and P.W. 3. Also this is a criminal case and fraud must be proved even more strictly than in a civil action for deceit. Can it be said that the Appellant was guilty of fraudulent intent in what he did?

He put in a figure which was slightly too low according to the experts, but he said that he hoped it would be accepted, and, if not, he would accept the Customs valuation.

Was that necessarily evidence of fraudulent intent on his part? People who are taking goods through the Customs do not in the ordinary way tend to put on them a higher value than they need. In this case the value had got to be something of an estimate by reason of the falling market. To show the difficulty, if P.W. 1, P.W. 2 and P.W. 3, the experts in the trade, were correct, then the 2 Customs Officers placed a value ($1.50 per yard) on the goods that was considerably too high. The market admittedly was, and had been for some time, a falling one and was, therefore, somewhat uncertain. At least one of the Prosecution experts (P.W. 2) agreed completely with the Appellant and the other 2 cloth dealers (P.W. 1 and P.W. 3) very largely agreed with the value he gave.

Should he then, in all the circumstances of the case, be held guilty of the crime of attempting fraudulent evasion of customs duties?

It was suggested by the Prosecution that the Appellant's conduct and remarks when he was being questioned were evidence of a guilty mind. I am of opinion that, taken as a whole, they do not go further than to show that he was confused. I do not agree with the learned District Judge that they showed there was an attempt to deceive the Customs.

On the facts of the case as a whole, and applying the principles laid down in *Derry v. Peek*, I have come to the conclusion that the case was not proved against the Appellant and accordingly I allow the appeal and set aside the conviction.

The order for forfeiture of the goods seized will be rescinded.

Appeal Allowed.

CHONG FONG SHEN v. CHAN PHOOI HOONG.

[Orig. Civil Juris. (Willan, C.J.) April 28, 1947]

Japanese Judgments and Civil Proceedings Ordinance, 1946, Section 3 (4)—Application to set aside a Japanese decree.

In this case the applicant applied to set aside a Japanese decree dated the 8th day of November 1943. This decree was a consent order following a purported settlement between the plaintiff and defendant in the case. It appeared that the parties to the Civil Suit in which the decree was made, both of whom had instructed and were represented by Counsel, were called into Chambers by Mr. Benjamin, who was then officiating as a Judge, without their Counsel being available to them, when terms of settlement were discussed and decided upon. Eventually a consent order was made not by Mr. Benjamin, as was stated in the decree, but by a Japanese Judge, Mr. Toda. According to the affidavit of Counsel for the defendant in the Japanese Civil Suit (the applicant in the case) it appeared that he only agreed to the consent order proposed by Mr. Toda because he was afraid of what would happen to himself and the plaintiff if he did not consent.

Held, (1) that there were irregularities in the hearing of the Japanese Suit in question in this case as the parties had been deprived of the services of their counsel at an important stage of the case and as the consent order was not in fact an order made by the Judge, by whom it purported to be made;

(2) that these irregularities were sufficient grounds for setting aside the Japanese decree under Section 3 (4) (d) of the Japanese Judgments and Civil Proceedings Ordinance 1946; and

(3) that the consent given to the making of the Japanese decree was in fact involuntary and that this was sufficient ground under Section 3 (4) (a) of the Japanese Judgments and Civil Proceedings Ordinance to set aside the decree.

Case referred to :—

(1) *Moscati v. Lawson* (1835) 1 M. & Rob. 454.

Rajendra for Applicant.

Ramani for Respondent.

ORIGINATING MOTION.

Willan, C. J. :—This is an application under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, to set aside a Japanese decree dated the 8th day of November, 2603 (1943) in Civil Suit No. 18 of 2603 (1943)—hereinafter in this judgment referred to as "the Civil Suit"—instituted in the Court of a Judge at Kuala Lumpur. By subsection (4) of that section a Japanese decree may be set aside on any of the following grounds :—

(a) that it was obtained as a result of such force, injury or detriment to any party to the proceedings or other person, or such threat thereof, as, in the opinion of the appropriate Court, was sufficient to render the action of the party in relation to the proceedings involuntary;

(b) that any necessary party did not appear personally but was represented by any person appointed by any Japanese authority;